Filed 6/27/19 P. v. Bethell CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. DATWAN TROY BETHELL, Defendant and Appellant.	B291447 (Los Angeles County Super. Ct. No. BA432818)

APPEAL from the judgment of the Superior Court of Los Angeles County, Kathleen Kennedy, Judge. Affirmed with directions.

Benjamin Owens, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Zee Rodriguez and Corey J. Robins, Deputy Attorneys General, for Plaintiff and Respondent.

Datwan Troy Bethell appeals[1] from the judgment entered following his conviction by jury on two counts of second degree robbery (Pen. Code,[2] § 211; counts 3 & 4) with personal firearm use (§ 12022.53, subd. (b)), and one count of battery (§ 242; count 5).[3] Bethell claims on appeal that the trial court abused its discretion during resentencing by imposing consecutive robbery sentences and refusing to strike the firearm enhancements because of the trial court's stated assumption that we had reversed Bethell's kidnapping for robbery convictions out of disrespect for the victims because they were marijuana dispensary employees.

We reject Bethell's claim. We conclude Bethell has not demonstrated the trial court's statements regarding our prior opinion had any impact on the court's sentencing choices. We reject the People's claim that the abstract of judgment must be corrected to reflect Bethell's sentence for the battery; the abstract of judgment reflects that sentence. We affirm the judgment;

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[1] This is Bethell's second appeal. In his first, we reversed for insufficiency of the evidence his two kidnapping to rob convictions (Pen. Code, § 209, subd. (b)(1); counts 1 & 2) but otherwise affirmed. (*People v. Bethell* (Aug. 3, 2017, B269854) [nonpub. opn.] pp. 1-2, 9, 14-15 (*Bethell I*).) We take judicial notice of the record in that case. (Evid. Code, §§ 452, subd. (d)(1), 459, subd. (a).)

[2] Unless otherwise indicated, subsequent section references are to the Penal Code.

[3] The battery was a lesser included offense of sexual battery by restraint (§ 243.4, subd. (a)); the jury acquitted Bethell of the latter charge. (*Bethell I*, *supra*, B269854, at pp. 2, 9.)

however, we direct the trial court to correct the abstract of judgment so that it does not reflect that Bethell's sentence included an "[a]dditional indeterminate term."

BACKGROUND[4]

In December 2014, Bethell entered a marijuana dispensary at Sunset and Hollywood Boulevards. He lacked money to buy marijuana so he left, saying he would return. Around closing time, Alexander Voit, a dispensary security guard, and Miranda G.,[5] an employee, were in the dispensary. Bethell and an accomplice entered the dispensary and robbed Voit and Miranda G. (counts 3 & 4) of merchandise, money, and personal property. Bethell also battered Miranda G. (count 5). Bethell presented alibi defense evidence. (*Bethell I*, *supra*, B269854, at pp. 2-5, 8.)

DISCUSSION

I. The Trial Court Did Not Abuse Its Discretion When Resentencing Bethell

A. *Factual Background*

1. *The 2016 Sentencing Hearing*

At Bethell's original January 22, 2016 sentencing hearing, the trial court imposed prison terms of life with the possibility of

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[4] A detailed recitation of the facts of the offenses may be found in *Bethell I, supra,* B269854, at pages 3 to 8, but is unnecessary to resolve Bethell's appeal.

[5] As in *Bethell I*, and to protect Miranda G.'s privacy, we use her first name and last initial only.

parole for the two aggravated kidnapping convictions, plus 10 years for the firearm enhancements. The court ordered that Bethell serve the sentences consecutively.

As to the two robbery counts, the trial court stated: "I am going to impose . . . a concurrent sentence on counts [3] and [4] with the sentence that I imposed on counts [1] and [2]." The court added: "So as to count [3], the court is going to select the midterm of three years . . . plus the ten years for the enhancement. And then on count [4], the one-third the midterm and one-third of the enhancement [i.e., a total of four years four months on count 4] and run all of that concurrent to the two . . . consecutive life with the possibility of parole terms that I imposed in counts [1] and [2]." The court imposed "a consecutive six months for [the] battery."

2. *Bethell I and the Modification Order*

Bethell appealed, and we reversed Bethell's convictions on counts 1 and 2 for insufficiency of the evidence; we affirmed the remaining convictions. (*Bethell I, supra,* B269854, at pp. 2, 14-15.) We explained: "All the movement of Miranda and Voit was within the dispensary, was incidental to the purpose of the robbery, and did not increase the risk of harm to either victim." (*Id*. at p. 14.) Nonetheless, we emphasized: "*We do not minimize the suffering of either victim during (and following) the robbery*, but that suffering resulted from the 'force and fear' necessarily present in Bethell's commission of the robbery and inherent in his use of a gun, rather than from the movement itself." (*Ibid.*)

With respect to sentencing, we stated: "On the two robbery counts, the court sentenced [Bethell] to *concurrent sentences* of 13 years (Miranda) and 52 months (Voit), which *also* were to run

concurrently with the sentences on the kidnapping counts." (*Bethell I*, *supra*, B269854, at p. 9, italics added.) In footnote 4, we observed: "The minute order and the abstract of [judgment] do not accurately reflect the trial court's oral pronouncement. As the People point[ ] out, both incorrectly state that the sentences on the two robbery counts are to run consecutively. The oral pronouncement that the sentences are concurrent controls, and '[w]hen an abstract of judgment does not reflect the actual sentence imposed in the trial judge's verbal pronouncement, this court has the inherent power to correct such clerical error on appeal, whether on our own motion or upon application of the parties.' [Citation.] We will therefore order that the abstract of judgment be corrected." (*Id*. at pp. 9-10.) Our disposition then stated: "The convictions on counts 1 and 2 are reversed. *The trial court shall amend the abstract of judgment to reflect that the sentences on counts 3 and 4 are concurrent, and shall forward the amended abstract of judgment to the California Department of Corrections and Rehabilitation.* In all other respects, the judgment is affirmed." (*Id*. at p. 15, italics added.)

On August 23, 2017, we issued an order modifying *Bethell I* (indicating it changed the judgment) by deleting footnote 4 on pages 9 and 10, and the second sentence of the disposition. (*Bethell I*, *supra*, B269854.)

3. *The 2018 Resentencing Hearing*

During the July 11, 2018 resentencing hearing, Bethell asked the trial court to strike the firearm enhancements pursuant to Senate Bill No. 620. Bethell also argued that *Bethell I* required concurrent sentences on counts 3 and 4. The court responded: "You know, I don't understand the appellate court

saying that . . . the convictions on counts [1] and [2] are reversed; I understand that. I mean, I disagreed with their conclusion but they get paid the big bucks; that was their conclusion."

The court, turning to the sentences on counts 3 and 4, said: "But then [the appellate court] said the court should amend the abstract of judgment to reflect the sentences on counts [3] and [4] are concurrent.[6] And it's well-settled law, at least my understanding, that when there are counts that are overturned and the matter is remanded, the court has discretion to resentence on other counts.

"And moreover, at the time that I imposed the sentence in the first instance, I did not make the sentences on counts [3] and [4] concurrent with each other. I made them concurrent with the sentences that I imposed on counts [1] and [2]. But I sentenced them consecutively because I sentenced count [4] to one-third the midterm and one-third the enhancement. And if you're doing concurrent sentences as to two counts, you never get to one-third the midterm or one-third the enhancement. It's just concurrent.

"But the appellate court didn't, I guess, understand—and maybe I could have been more clear; obviously I could have been more clear in the sentencing in the first place. But the whole point of my sentence initially was that the sentence that I imposed on counts [3] and [4] was concurrent with the sentence that I imposed on counts [1] and [2]. But [counts 3] and [4] were consecutive to each other."

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6 The trial court's statement suggests the trial court may not have received our modification order.

The court noted: "So the way I look at it is this: now I remember this case vividly because there was a videotape of this incident . . . it wasn't one of these grainy videotapes that was hard to see what was going on. It was really clear, like high-definition security cameras that were in this marijuana dispensary, that specifically showed [Bethell] dragging the female around by her hair and threatening with the gun, and using the gun, terrorizing these two people."

The court wondered: "I don't know if the court of appeal had some, I don't know, animosity to this case because the victim was a marijuana dispensary and the victims were marijuana dispensary workers. . . . This crime occurred before recent legislation, you know, legalizing marijuana and marijuana dispensaries and so forth in California. But these victims were not it seems to me given the same respect that other victims not working in the marijuana dispensary would receive if they were victims of an armed robbery."

Regarding resentencing, the court observed: "So, you know, if I had the discretion, which I feel I do, I would sentence the defendant as follows: and he has never . . . shown any remorse. He testified falsely during the trial itself. His license number . . . on his car was seen by witnesses which helped identify him. He had been at the marijuana dispensary earlier in the day purchasing marijuana, had filled out a card. You had to have a medical card to purchase marijuana at that time, and you had to fill out a form and sign the form. And the young woman who worked at the dispensary recognized him and went back to the cards and was able to pull the card with his name on it to help identify him."

Discussing, inter alia, "the gun enhancement," the court commented: "And so the way I look at it is, number one, I do not see that I should exercise my discretion in striking the gun enhancement because of the fact that his use of this gun was blatant and threatening to both of the victims continuously. And this was not like the co-defendant was using the gun. [Bethell] was using the gun. And the young woman was absolutely terrified. And she testified during the course of the trial to the terror that she felt, and rightfully so. Even when they already had gotten the marijuana, they forced the people to go out the front door with them, which I couldn't understand. And then the one guy runs off, and the female victim runs back in and locks the door. This was a horrible robbery, and vividly displayed on the tape. So I am not going to grant [Bethell] probation. I'm not going to strike the gun enhancement."

The court noted it had initially sentenced Bethell "on count [3] to the midterm of three years and then ten years for the gun enhancement because . . . I felt that . . . the way the gun was utilized in this case, the vulnerability of the victims, the terror that he caused to them, justified the high[7] term of ten years on the gun use." As to count 4, "there was a separate victim, and the gun was used against that separate victim [as] well. So I would select one-third the midterm for a year, plus one-third of the enhancement for three years and four months. So that's a total of four years and four months. And I determined that it's

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7 The parties acknowledge that at the time the crimes were committed, a section 12022.53, subdivision (b) enhancement was simply 10 years. There is no need to discuss further the trial court's reference to the "high term."

appropriate for consecutive sentencings because of the fact that there were two victims, and the threat of violence was used against both victims who offered no resistance to [Bethell] whatsoever. And [Bethell] has previously been unsuccessful on probation, and his crimes are of increasing seriousness." The court ordered that the six-month jail term for the battery remain in effect, and that Bethell serve that term consecutively to the felony prison terms.

B. *Standard of Review and Applicable Law*

"It is well established a trial court has discretion to determine whether multiple sentences are to run concurrently or consecutively. (§ 669; [citation].)" (*People v. Lepe* (1987) 195 Cal.App.3d 1347, 1350.) Additionally, "[t]he Legislature amended . . . section 12022.53, subdivision (h), effective January 1, 2018, to give the trial court discretion to strike, in the interest of justice, a firearm enhancement imposed under [that statute]. [Citations.]" (*People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1079-1080, fn. omitted.)[8]

We review the trial court's sentencing decisions for abuse of discretion. (*People v. Gibson* (2016) 2 Cal.App.5th 315, 325.) Absent a clear showing of abuse, we will not disturb the trial court's exercise of discretion when deciding to impose consecutive rather than concurrent sentences. (*People v. Lepe*, *supra*, 195 Cal.App.3d at p. 1350.) "The trial court abuses its discretion only when, considering all the circumstances, its determination

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[8] The trial court here expressly acknowledged it had discretion to strike the firearm enhancements and refused to strike them.

exceeds the bounds of reason." (*Ibid.*) When reviewing for abuse of discretion, we are guided by the fundamental precept that the burden is on the party attacking the sentence to show clearly that the sentencing decision was irrational or arbitrary. (*People v. Carmony* (2004) 33 Cal.4th 367, 376-377.)

C. *Analysis*

We note at the outset that, as indicated above, the trial court imposed consecutive sentences on counts 3 and 4 at the 2016 sentencing hearing when it imposed on count 4 "one-third the midterm and one-third of the enhancement." This was an implicit reference to consecutive sentencing pursuant to section 1170.1, subdivision (a), although, as the trial court recognized, it "could have been more clear" that the sentences on counts 3 and 4 were consecutive to each other. We note that the January 22, 2016 minute order and the abstract of judgment filed on January 28, 2016, reflect that Bethell was to serve his sentences on counts 3 and 4 consecutively to each other.

Although we originally indicated in dicta[9] in *Bethell I* that the sentences on counts 3 and 4 ran concurrently with each other, that was incorrect; we subsequently recognized that the trial court did, in fact, impose on counts 3 and 4 sentences that were consecutive to each other. We modified the opinion to delete footnote 4 and to change the disposition so that it did not mandate that the sentences on counts 3 and 4 be concurrent with each other.

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[9] *Bethell I* held that insufficient evidence supported the convictions on counts 1 and 2.

There is no dispute that, at the 2018 resentencing hearing, the trial court was entitled to impose consecutive sentences on counts 3 and 4. Bethell concedes that during resentencing, "the trial court apparently had discretion to impose consecutive sentences. (§ 669, subd. (a).)"

The trial court made statements during the resentencing hearing indicating that it disagreed with *Bethell I's* reversal of the convictions on counts 1 and 2. The trial court made its "big bucks" remark *concerning those counts*.

The trial court then shifted its focus to counts 3 and 4. The court characterized Bethell's actions as "terrorizing these two people." The trial court then speculated that we had animosity toward this case and failed to respect the victims because they worked in a marijuana dispensary.

When resentencing Bethell, the trial court acknowledged its sentencing discretion. The court gave its reasons for the sentence it imposed, including Bethell's lack of remorse, the falsity of his alibi testimony, his use of a gun, the vulnerability of his victims, and the effect his conduct had on them. (See Cal. Rules of Court, rules 4.421 & 4.425.)

Nothing in the trial court's comments when resentencing Bethell suggests its exercise of its sentencing discretion was the result of a bias against him engendered by our opinion in *Bethell I*, with which the trial court disagreed. The court supported its choices with sentencing factors drawn from the evidence in this case. Both before and after *Bethell I*, the trial court imposed the exact same sentence on counts 3 and 4: Bethell's sentences on those counts were consecutive to each other. That fact undermines his claim that trial court bias impacting resentencing on those counts arose from the trial court's reading of *Bethell I*.

The trial court's "general discussion on the subject" (*People v. Superior Court (Brown)* (1980) 111 Cal.App.3d 948, 952) of *Bethell I* did not provide a basis for its sentencing choices. (Cf. *People v. Superior Court (Brown)*, *supra*, at p. 952 [record precluded appellate court "from reading the [trial] court's comment as anything more than a general discussion on the subject of selective enforcement, surely not as an express finding on the evidence or even as a basis for its ruling that there was no probable cause to stop defendant"].)[10]

We conclude that Bethell has failed to demonstrate that the trial court abused its discretion by resentencing him to consecutive sentences or by refusing to strike the firearm enhancements.

D. *We Need Not Address the People's Forfeiture Argument*

The People argue that Bethell forfeited his resentencing claim by failing to object on the grounds he asserts here. Bethell disagrees, arguing in part that the unmodified *Bethell I* opinion required the trial court to impose concurrent sentences on counts 3 and 4 following remand; therefore, an objection was

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[10] The People assert Bethell is claiming that the trial court engaged in "vindictive" resentencing. Bethell makes no such express claim. Nor does he argue, e.g., that the trial court vindictively imposed a harsher sentence on counts 3 and 4 in violation of due process. (See *People v. Williams* (1998) 61 Cal.App.4th 649, 654.) Moreover, even if Bethell were claiming vindictive resentencing occurred, our previous analysis demonstrates such a claim would be without merit.

unnecessary and Bethell "should not be punished for the errors of the courts in this case regarding the remittitur by finding forfeiture."

It appears that, at the resentencing hearing, neither the trial court nor the parties had a copy of our order modifying *Bethell I*. In light of our analysis on the merits, taking into consideration the modification order, there is no need to decide the People's forfeiture argument or whether it would be fair to impute forfeiture (see *Velasquez v. Centrome, Inc*. (2015) 233 Cal.App.4th 1191, 1210-1211 ["Forfeiture is largely a matter of fairness, both to the trial court and to an opposing party"]).

II. The Trial Court Must Correct the Abstract of Judgment

The People claim that the abstract of judgment filed on July 19, 2018 must be corrected because it erroneously omits any reference to Bethell's six-month consecutive sentence for battery. We disagree. Item 13 on page 2 of the abstract refers to "Other orders (*specify*)," then states in relevant part: "Ct. 5, PC 242 MISD, defendant to serve 6 months in Los Angeles County Jail to run consecutive to count(s) 3 and 4 and may be served in any penal institution."

However, we note that at item 7 on page 1 of the abstract of judgment, a box was checked to indicate that the trial court sentenced Bethell to an "Additional indeterminate term (see CR-292)." This was clerical error. In *Bethell I*, we reversed for insufficiency of the evidence Bethell's convictions on counts 1 and 2, his only convictions carrying indeterminate terms. We will direct the trial court to correct the above mentioned error. (Cf. *People v. Humiston* (1993) 20 Cal.App.4th 460, 466, fn. 3.)

DISPOSITION

The judgment is affirmed. The trial court is directed to correct item 7 in the abstract of judgment by deleting the check mark in the box next to the phrase "Additional indeterminate term (see CR-292)." The trial court is also directed to forward a copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

BENDIX, J.